

### REMARKS

Claims 1-15 are pending. Applicants respectively request reconsideration of claims 1-15 based on this Amendment.

Applicants thank the Examiner for the withdrawal of the rejection of claims 9-15 under 35 U.S.C. §112 from the previous office action.

### ARGUMENTS

Before addressing the rejections in the present office action, it is important to understand the invention and the problem addressed. The present invention provides a **fully baked** breadstick food product which retains its soft texture when **stored at refrigeration temperatures**. The **fully baked** breadstick food product can refrigerated and served cold or reheated without becoming leathery, dry, stale and/or tough. The problem addressed by the present invention is described in detail in the background section of the present specification. More specifically, it is noted that:

“Baked bread products are normally available as freshly prepared products that are intended to be consumed within a relatively short time period or as frozen products which can be stored in the frozen state for relatively long periods of time. Such frozen bread products, once thawed, generally must also be consumed within a relatively short time period. **Baked bread products are generally not sold as refrigerated products. Once a fully baked bread product has been refrigerated, it tends to ‘toughen’ or become leathery, stale, and/or dry.** See, for example, David, English Bread and Yeast Cookery, American Edition, p. 255 (Viking Press, New York 1977). When such a bread product becomes ‘leathery’ (a term of art), it becomes harder to chew and loses its ‘chewability.’

“**Reheating such a leathery bread product does not generally restore the bread’s texture and may, in fact, further ‘toughen’ it to form an even more leathery texture.** Thus, while such a leathery bread product may be fully edible from all health and safety considerations, the consumer’s enjoyment obtained from such a reheated product is generally less, often significantly less, than that experienced when the bread product was fresh; much of the loss of quality is due to the bread product becoming increasingly more leathery. Thus, fully baked bread products are not often found in

grocery refrigerator cases.” Specification, p. 1, l. 22, through p. 2, l. 15 (emphasis added).

The present inventors have found a combination, and specific ranges, of ingredients which overcomes this problem. The present **fully baked** breadstick product can be stored under refrigeration conditions for at least three months without exhibiting the problems normally associated with refrigerated bread products. This is a significant and unexpected advance in the art.

### 1. Rejection of Claims 9-15 under 35 U.S.C. §103(a)

Claims 9-15 were rejected by the Examiner as being obvious under 35 U.S.C. §103(a) over Haegens et al. (U.S. Patent 5,260,075) in view of Atwell (U.S. Patent 5,792,499), Loose (U.S. Patent 969,173), Cochran et al. (U.S. Patent 5,747,084), The Encyclopedia of Chemical Technology, and Baking Science & Technology.

Applicants assert that Examiner's rejection of Claims 9-15 is improper because none of the cited references teach or suggest the combination of elements of the claimed invention. The Federal Circuit has stated that it is necessary, in order to support a rejection of claims under §103(a) using a combination of references, that there be a teaching or suggestion in one or more of the cited references to combine the elements of the claimed invention. *In re Dow Chemical Co.*, 5 U.S.P.Q.2d 1529 at 1531-32 (Fed.Cir. 1988); *ACS Hospital Systems, Inc. v. Montefiore Hospital et al.*, 221 U.S.P.Q. 929 at 933 (Fed.Cir. 1984); *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 220 U.S.P.Q. 303 at 311 (Fed.Cir. 1983). The mere fact that the prior art can be modified does not make the modification obvious, unless the prior art taught or suggested the desirability of the modification. *In re Gordon*, 221 USPQ 1125 (Fed. Cir. 1984).

#### **A. References cited by the Examiner.**

The primary reference Haegens et al. discloses a method for making “a breadstick tasting breadlike” (col. 1, l. 7-10) as opposed to the traditional crisp and crumbly breadstick (col. 1, l. 15-17). The Examiner stated that “the product disclosed by Haegens et al. is the **same type of product** claimed and the water activity **is expected to be the same** because the water activity claimed is common

to baked goods" (emphasis added). However, as noted by the Examiner many ingredients in the present invention are absent in Haegens et al. Further, the Haegens et al. "breadstick" requires approximately half the water and twice the shortening as the present invention. Thus, both the differences in the ingredients as well as the proportions of the ingredients make the present invention distinct from the Haegens et al. reference.

Additionally, the Examiner concluded that "it would have been obvious to store the product in a seal package in the refrigerator for extended storage. The storage will be the same as claimed **because it is the same type of product**" (emphasis added). Nowhere does Haegens et al. teach or suggest that their breadstick product would be suitable for refrigerated storage, much less than it would have a shelf life of at least three months under refrigerated storage conditions or that, once removed from refrigerated storage, it could be served cold or reheated without becoming "leathery" or tough.<sup>1</sup> Indeed, Haegens et al. does not even mention any type of storage conditions; thus, one of ordinary skill in the art would conclude that the Haegens et al. product was intended for consumption in a manner similar to conventional bread products (i.e., generally within a week or so of baking).

Haegens et al. describes only that the "product is ready to be packaged." (Col.3, lines 16-17). The reference does not detail type of packaging used, if the product is even suitable for refrigerated storage much less if the product maintains its breadlike taste under refrigerated conditions, if the package will extend the shelf life of the bread, or if the ingredients used in Haegens et al. render a bread with an extended shelf life. Thus, Haegens et al. is not related to preparing bread products intended to be stored under refrigeration conditions, much less having extended shelf life under refrigerated conditions. At most Haegens et al. describes a breadstick with an normal shelf life that tastes "breadlike" at room temperature,

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<sup>1</sup>. Indeed, the references cited by the Examiner in the present rejections (except Cochran et al. which requires a much lower water activity) do not relate to **fully baked** bread products intended to be **stored for prolonged periods under refrigeration conditions**. One of ordinary skill in the art seeking to overcome the problems associated with prolonged refrigeration storage of bread would not have even looked to the art cited by the Examiner (except perhaps for Cochran et al. which would have taught away from the present invention due to the significantly lower water activity) since that art is directed to conventional baked bread products.

whereas the present invention contemplates a breadstick with an extended shelf life that can be refrigerated and subsequently eaten cold, warm or hot (reheated) while retaining the desired texture properties.

Atwell discloses a method for increasing the storage stability of refrigerated **dough**. Specifically, Atwell describes a method of reducing syruing in refrigerated dough compositions. Col. 2, lines 46-63. Atwell is not directed to methods for increasing the storage stability of the resulting **baked goods under refrigerated conditions**.

Loose discloses a biscuit or cracker with a broken or interrupted zone of weakness, along which the biscuit may be separated into a predetermined number of pieces. Loose is not related to preparing bread products having **extended shelf lives under refrigerated conditions**.

Cochran et al. discloses a ready-to-assemble, ready-to-eat packaged pizza kit wherein a baked pizza crust is provided having a water activity in the range of about 0.6-0.85, the baked crust being suitable for use in a refrigerated ready-to-eat pizza kit. The pizza kit also includes a pizza sauce component and a plurality of pizza toppings, which are hermetically sealed in separate sections of a package having a compartmentalized base tray and a fitted top sealed to the base tray. As pointed out by the Examiner, Cochran et al. also teaches that many baked goods (*i.e.*, **conventional baked goods**) have a water activity of about 0.90-0.98. However, it must be noted that these baked goods are the ones which are **not suitable for refrigerated kits**. Cochran et al. provides a dough formulation, in Baker's percentages, as follows: 100 pounds flour, 50-60% water, 4-5% vegetable oil, 4-5% solid vegetable shortening, 1-1.5% salt, 2-3% sugar, and 0.3-0.7% dried yeast. Col. 4, lines 24-27.

The portion of the Encyclopedia of Chemical Technology relied upon by the Examiner is related to the use of mold inhibitors, such as calcium propionate, in bread making. There is no indication in the reference that use of such mold inhibitors would increase the shelf lives of bread products at least three months **under refrigerated conditions**.

The portion of Baking Science & Technology relied upon by the Examiner is related to the use of dough conditioners in bread making. Although it is noted that such dough conditioners provide "extended keeping properties," there is no indication that they would allow shelf lives of at least three months under refrigerated conditions.

***B. Present Invention.***

As discussed above, the present invention is directed to a soft, fully baked breadstick which can be baked, refrigerated and served cold or reheated without becoming leathery, dry stale and/or tough. The breadstick product has a water activity of about 0.9-0.95, and will retain satisfactory texture and chewability characteristics throughout its shelf-life of "at least three months." In a preferred embodiment, the breadstick product itself comprises at least two, integral and fully baked bread products wherein each fully baked bread product can be easily separated along perforations baked into the fully baked bread product in order to form two or more, and more preferably, only three, breadstick-shaped products. The breadstick product may be consumed in unseparated form as a loaf type bread product, or separated as individual breadsticks. Moreover, the breadstick product may be consumed directly from the package with or without further heating as desired by the consumer.

***C. No Suggestion to Combine or Modify the References.***

As stated above, in order to support a rejection of claims under 35 U.S.C. §103(a), using a combination of references, it is not sufficient that the combination of references define the claimed invention. Rather, what is needed is a teaching or suggestion to combine elements to arrive at the invention **found in one or more of the prior art references**. None of the references the Examiner relies on contains any teaching or suggestion to combine the elements to arrive at the claimed invention. Therefore, the reliance on these references to sustain a rejection under §103(a) is improper.

Haegens et al. contains no suggestion for either refrigeration or extended shelf life of bakery goods it only describes that the "product is ready to be packaged." (Col.3, lines 16-17). Atwell only describes bread dough as opposed to

the present invention which is baked bread. Further, Atwell describes a method of reducing syruping in **refrigerated dough compositions**, which is not a concern in baked bread and therefore provides no motivation to combine. Loose does not teach or suggest the use of perforations in a refrigerated soft breadstick product packaged in a compartmentalized, hermetically sealed container having an extended shelf life under refrigerated conditions. Neither the Encyclopedia of Chemical Technology nor the book Baking Science and Technology teach how to prepare bake goods having **extended shelf lives under refrigerated conditions**. Indeed, the only reference cited by the Examiner which even addresses a baked breadlike product which can be stored under refrigerated conditions is Cochran et al.

The Examiner relies on Cochran et al. as teaching a baked good with a "water activity in the range of about 0.9-0.98." Col. 3, line 37-39. This use of Cochran et al. is improper. Cochran et al. in the portion relied on by the Examiner is referring to "[c]ommon baked goods," (Col. 2, lines 37-39) and not baked goods that would be suitable for a refrigerated, ready-to-eat kit. Cochran et al. requires their product to have a water activity of 0.6 to 0.85 in order to avoid the "leathery, dry, stale and/or tough" texture associated with the refrigeration of common baked goods. Col. 2, lines 31-35; col. 3 lines 34-50. This water activity, (i.e., 0.6 to 0.85) in combination with the specific dough formulation provide the desired texture which allow a refrigerated, ready-to-eat pizza product in Cochran et al. Thus, Cochran et al. **actually teaches away** from the use of baked goods having a water activity of 0.90 to 0.95 as required by the present claims. In the Office Action, the Examiner has completely ignored this aspect of Cochran et al. and merely argued that this reference teaches the use of water activities of about 0.9 to 0.98 without any regard to the specific teachings as outlined above. This is improper. Cochran et al. merely points out that **conventional baked products** normally have a high water activity (i.e., 0.9-0.98). As noted in the portion of the background of the invention quoted above, it is this type of conventional bread product which is not suitable for refrigerated storage.

***D. If References are Properly Combinable, Invention still Non-obvious.***

Even if these references were properly combined, together they still would not provide the present invention. The Federal Circuit has held that "the test for obviousness is not whether the features of one reference may be bodily incorporated into another reference... rather we look to see whether the combined teachings render the claimed subject matter obvious." *In re Wood*, 599 F.2d 1032, 202 USPQ 171, 174 (CCPA 1979). None of the references cited by the Examiner when combined render the present invention "as a whole" obvious. Haegens et al. describes a breadstick with a normal shelf life that tastes breadlike at room temperature. Atwell describes a method of reducing syruping in refrigerated dough compositions. Loose discloses a biscuit or cracker with a broken or interrupted zone of weakness. Cochran describes the water activity of refrigerated pizza crust as 0.6-0.85, whereas unrefrigerated dinner roll with a water activity of 0.9-0.98. The Encyclopedia of Chemical Technology teaches use of mold inhibitors in bakery products. While the book Baking Science and Technology teaches use of dough conditioners in bread making. The combined teachings fail to teach or suggest a soft, **fully baked breadstick** which can be baked, **refrigerated** and served cold or reheated without becoming leathery, dry stale and/or tough. Further the combined teachings fail to teach a breadstick product having a water activity of about 0.9-0.95, and will retain satisfactory texture and chewability characteristics throughout its **shelf-life of "at least three months."**

One of ordinary skill in the art considering these references would not have used the dough relaxers disclosed in Atwell for the fully baked bread since Atwell described using such dough relaxers to reduce the syruping in refrigerated dough. Therefore, one skilled in the art would not have modified Haegens et al. et al. using the teachings of Atwell because syruping is not a problem in the fully baked bread disclosed in Haegens et al. Additionally, one of ordinary skill have understood the Cochran et al. reference as teaching a water activity of 0.6 to 0.85. Thus, one of ordinary skill in the art would have modified the baked good of Haegens et al. to obtain a water activity of 0.6 to 0.85, not the 0.9 to 0.98 water activity as suggested by the Examiner. Indeed, one of ordinary skill in the art could combine the

references in the manner suggested by the Examiner only with the use of hindsight based on the present specification. Indeed, as pointed out above and except for the low water activity product of Cochran et al., none of the references cited by the Examiner even related to fully baked bread products suitable for refrigerated storage. As the Examiner knows, such hindsight reconstruction is improper. *W.L. Gore & Associates, Inc. v. Garlock*, 220 U.S.P.Q. 303, 313 (Fed. Cir 1983).

## **2. Rejection of Claims 1-8 under 35 U.S.C. §103(a)**

Claims 1-8 were rejected by the Examiner as being obvious under 35 U.S.C. §103(a) over Haegens et al. (U.S. Patent 5,260,075) in view of Rozzano (U.S. Patent 5,695,798), Snyder (U.S. Patent 5,167,973), Atwell (U.S. Patent 5,792,499), Loose (U.S. Patent 969,173), Cochran et al. (U.S. Patent 5,747,084), The Encyclopedia of Chemical Technology, and Baking Science & Technology.

Applicants assert that Examiner's rejection of Claims 1-8 is improper because none of the cited references teach or suggest the combination of elements of the claimed invention. The Federal Circuit has stated that it is necessary, in order to support a rejection of claims under §103(a) using a combination of references, that there be a teaching or suggestion in one or more of the cited references to combine the elements of the claimed invention. *In re Dow Chemical Co.*, 5 U.S.P.Q.2d 1529 at 1531-32 (Fed.Cir. 1988); *ACS Hospital Systems, Inc. v. Montefiore Hospital et al.*, 221 U.S.P.Q. 929 at 933 (Fed.Cir. 1984); *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, , 220 U.S.P.Q. 303 at 311 (Fed.Cir. 1983). The mere fact that the prior art can be modified does not make the modification obvious, unless the prior art taught or suggested the desirability of the modification. *In re Gordon*, 221 USPQ 1125 (Fed. Cir. 1984).

The primary reference Haegens et al., as well as the secondary references Atwell (U.S. Patent 5,792,499), Loose (U.S. Patent 969,173), Cochran et al. (U.S. Patent 5,747,084), The Encyclopedia of Chemical Technology, and Baking Science & Technology, were applied in essentially the same manner as discussed above. The discussion of these references from above is hereby incorporated by reference. The newly cited secondary references (i.e., Rozzano (U.S. Patent 5,695,798) and



Snyder (U.S. Patent 5,167,973)) do not correct the deficiencies of the primary reference and the other secondary references as detailed above.

Rozzano discloses a compartmentalized, plastic food package including a container and sealed cover. However, the reference neither discloses use of such container in relation to bread products nor does it disclose a hermetically sealed tray that can extend the shelf life compartmentalized food products. Additionally the reference fails to disclose or suggest using of the package under refrigerated conditions while retaining satisfactory texture and chewability characteristics of a fully baked bread product.

Snyder discloses a plastic food container which stores both milk and breakfast cereal stored at room temperature. The reference does not describe using such container in relation to fully baked bread products. Additionally the reference teaches away from the present invention because it describes "a self contained breakfast cereal and milk container that capable of compact and **non-refrigerated** storage." Col. 2, Lines 29-30. Therefore, Snyder fails to disclose or suggest using the package under refrigerated conditions while retaining satisfactory texture and chewability characteristics of the baked bread products.

As detailed above, the present invention is not obvious over Haegens et al., Atwell, Loose, Cochran et al., Encyclopedia of Chemical Technology, and Baking Science & Technology because there is no suggestion to combine or modify the references. As also detailed above, even if the references are properly combinable, the invention is still non-obvious. Those arguments from above are fully incorporated herein. The new secondary references are generally related to food containers and cannot correct the deficiencies of the other references.

Applicants respectively request that this rejection be withdrawn.


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In view of the foregoing Applicants respectfully request that the Examiner allow claims 1-15, and pass the application to issue. If the Examiner believes that a personal or telephonic interview would be helpful to terminate any issues which may

remain in the prosecution of the application, the Examiner is requested to telephone Applicants' attorney at the telephone number set forth below.

Respectfully submitted,

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